Brigham Young University Law Review

VOLUME 1980

Copyright © 1980, 1981
BRIGHAM YOUNG UNIVERSITY LAW REVIEW

EDITORIAL OFFICES: The *Brigham Young University Law Review* is published at the J. REUBEN CLARK LAW SCHOOL, Provo, Utah 84602 by the Brigham Young University Law Review. All communications should be sent to the editorial offices.

Views expressed herein are to be attributed to their authors and not to the Law Review, its editors, or Brigham Young University, unless otherwise indicated.

SUBSCRIPTIONS: The *Brigham Young University Law Review* is published twice in the second quarter, once in the third quarter, and once in the fourth quarter of the year. The subscription rate is $15 for one year. Single issues may be obtained for $5 per issue and reprints of most Articles and Comments for $2 per copy. If the subscriber wishes his subscription discontinued at its expiration, notice should be sent; otherwise, it is assumed that continuation is desired.

Second-class postage paid at Provo, Utah, and at additional mailing office. U. S. Postal Service publication # SECD-128170. Send address changes to *Brigham Young University Law Review*, J. Reuben Clark Law School, Room 453, Provo, Utah 84602.

Copyright: © Brigham Young University Law Review, 1980, 1981.

ARTICLES & ESSAYS—TITLES

PAGE

CAN THE FEDERAL COURTS KEEP ORDER IN THEIR OWN HOUSE? APPELLATE SUPERVISION THROUGH MANDAMUS AND ORDERS OF JUDICIAL COUNCILS: *Brent D. Ward* 233

CONTRIBUTION AMONG ANTITRUST VIOLATORS: A QUESTION OF LEGAL PROCESS: *Douglas C. Floyd* 183

DWORKIN'S RIGHTS THESIS: IMPLICATIONS FOR THE RELATIONSHIP BETWEEN THE LEGAL ORDER AND THE MORAL ORDER: *Livingston Baker* 837

FULLER COURT AND STATE CRIMINAL PROCESS: THRESHOLD OF MODERN LIMITATIONS OF GOVERNMENT, THE: *William F. Duker* 275

GAP BETWEEN LAW AND MORAL ORDER: AN EXAMINATION OF THE LEGITIMACY OF THE SUPREME COURT ABORTION DECISIONS, THE: *Lynn D. Wardle* 811

IN SEARCH OF A ROLE FOR THE LEGAL SYSTEM: *Fernando E. Agruit* 797

JURY AS A SOURCE OF REASONABLE SEARCH AND SEIZURE LAW, THE: *Ronald J. Bacigal* 739

LAW, SOCIETY, AND MORAL ORDER: INTRODUCTION TO THE SYMPOSIUM: *Richard D. Schwartz* 721

LAW, THE PROBLEMS OF POVERTY, AND THE "MYTH OF RIGHTS": *Michael Diamond* 785

LIABILITY IN MASS IMMUNIZATION PROGRAMS: *Nina S. Appel* 69

MR. JUSTICE RUFUS W. PECKHAM AND THE CASE OF *Ex Parte* Young: LOCHNERIZING *Munn v. Illinois*: *William F. Duker* 539

MR. JUSTICE RUFUS W. PECKHAM: THE POLICE POWER AND THE INDIVIDUAL IN A CHANGING WORLD: *William F. Ducker* 47

RECOVERY OF CONSEQUENTIAL DAMAGES FOR PRODUCT RECALL EXPENDITURES: *Bradford Stone* 485

ROLE OF LAWYERS: BEYOND ADVOCACY, THE: *William Rich* 767

STUBBORN AND REBELLIOUS CHILDREN: LIABILITY OF PUBLIC OFFICIALS FOR DETENTION OF CHILDREN IN JAILS: *Mark Soler, Michael J. Dale,* and *Kathleen Flake* 1

TEACHER DISMISSAL: A VIEW FROM *Mount Healthy*: *E. Gordon Gee* 255

WRITINGS OF CHIEF JUSTICE ROGER J. TRAYNOR, THE: *James E. Sabine* and *Robert S. Clark* 561

COMMENTS

PAGE

Age Discrimination in Employment Act Amendments of 1978: Tension Between Congress and the Courts 569

Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act? 93

An Analytical Model to Assure Consideration of Parental and Familial Interests when Defining the Constitutional Rights of Minors—An Examination of *In Re* Scott K. 598

Emerging Computer-Assisted Legal Analysis Systems 116

Employer Lawsuits Against Employees—The Right to Invoke The Legal Process Despite Anti-Union Motivation or Coercive Effect on Section 7 Rights 880

Equal Protection for Illegitimate Children: A Consistent Rule Emerges 142

Interstate Extradition: Should the Asylum State Governor Have Unbridled Discretion 376

Software Taxation: A Critical Reevaluation of the Notion of Intangibility 859

Spanish Experience in Church-State Relations: A Comparative Study of the Interrelationship Between Church-State Identification and Religious Liberty, The 616

Substantive Due Process Analysis of Nonlegislative State Action: A Case Study 347

Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power, The 295

Truth-In-Testing Legislation: A Brief for the Status Quo 902

CASENOTES

PAGE

Application of the "Exculpatory No" Defense to Prosecutions Under 18 U.S.C. § 1001: *United States v. Fitzgibbon* 655

California Supreme Court Expands the Informed Consent Doctrine; Physicians Have a Duty to Obtain an Informed Refusal: *Truman v. Thomas* 933

Constitutional Law—Civil Procedure—Implied Cause of Action—Extending Bivens to the Fifth Amendment—*Davis v. Passman* 165

Constitutional Law—Defamation—The Supreme Court Places Further Limitations on Designation as a "Public Figure" in Libel Actions—*Wolston v. Reader's Digest Association* 450

Constitutional Law—Free Exercise of Religion—State May Require a Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibit Photographs of Any Type—*Johnson v. Motor Vehicle Division* 471

Expanding Federal Court Jurisdiction of Railway-Labor Minor Disputes: *Richins v. Southern Pacific* 913

Extending the Limits of Judicial Review of Regulatory Orders: *Committee of Consumer Services v. Public Service Commission* 921

Impact of Expanded Rules for Determining What Constitutes the "Same Offense" for Double Jeopardy Purposes—*Illinois v. Vitale* 948

Implied Warranty of Habitability and Security in Residential Leases: *Trentacost v. Brussel* 684

Labor Law—Reverse Political Checkoff Per Se Illegal as Violation of Federal Election Campaign Act, 2 U.S.C. § 441b—*Federal Election Commission v. National Education Association* 403

Live, Human-made Bacteria As Patentable Subject Matter Under 35 U.S.C. § 101: *Diamond v. Chakrabarty* 705

Maryland's Equal Rights Amendment Challenges the Common Law Action of Criminal Conversation: *Kline v. Ansell* 664

Union Held Liable in Contribution to Employer for Title VII Violations: *Glus v. G.C. Murphy Co.* 696

Wage and Price Controls—Government Contracts—Executive Use of the Federal Procurement Act to Disbar Private Firms from Government Contracts if Wages and Price Standards are not Followed—*AFL-CIO v. Kahn* 431

Wrongful Life—Impaired Infant's Cause of Action Recognized: *Curlender v. Bio-Science Laboratories* 676

ARTICLES & ESSAYS—AUTHORS

PAGE

AGRAIT, FERNANDO E.: *In Search of a Role for The Legal System* 797

APPEL, NINA S.: *Liability in Mass Immunization Programs* 69

BACIGAL, RONALD J.: *The Jury as a Source of Reasonable Search and Seizure Law* 739

BAKER, LIVINGSTON: *Dworkin's Rights Thesis: Implications for the Relationship Between the Legal Order and the Moral Order* 837

CLARK, ROBERT S.: *The Writings of Chief Justice Roger J. Traynor* 561

DALE, MICHAEL J.: *Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails* 1

DIAMOND, MICHAEL: *Law, the Problems of Poverty, and the "Myth of Rights"* 785

DUKER, WILLIAM F.: *The Fuller Court and State Criminal Process: Threshold of Modern Limitations of Government* 275

DUKER, WILLIAM F.: *Mr. Justice Rufus W. Peckham and the Case of* Ex Parte *Young: Lochnerizing* Munn v. Illinois 539

DUKER, WILLIAM F.: *Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World* 47

FLAKE, KATHLEEN: *Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails* 1
FLOYD, DOUGLAS C.: *Contribution Among Antitrust Violators: A Question of Legal Process* 183
GEE, GORDON E.: *Teacher Dismissal: A View from* Mount Healthy 255
RICH, WILLIAM: *The Role of Lawyers: Beyond Advocacy* 767
SABINE, JAMES E.: *The Writings of Chief Justice Roger J. Traynor* 561
SCHWARTZ, RICHARD D.: *Law, Society, and Moral Order: Introduction to the Symposium* 721
SOLER, MARK: *Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails* 1
STONE, BRADFORD: *Recovery of Consequential Damages for Product Recall Expenditures* 485
WARD, BRENT D.: *Can the Federal Courts Keep Order in their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils* 233
WARDLE, LYNN D.: *The Gap Between Law and Moral Order: An Examination of The Legitimacy of the Supreme Court Abortion Decisions* 811

INDEX—DIGEST

Page references in bold-faced type are to ARTICLES and ESSAYS; in italics to COMMENTS; and in plain type to CASENOTES.

A

ABORTION

Law and Morals
The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions **811**

ADMINISTRATIVE LAW AND PROCEDURE

Good Cause Exception
Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act? *93*

ANTITRUST LAWS

Antitrust Contribution
Contribution Among Antitrust Violators: A Question of Legal Process **183**

C

CHILDREN'S RIGHTS

Detention of Children
Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails **1**

CIVIL PROCEDURE

Due Process
Implied Cause of Action—Extending *Bivens* to the Fifth Amendment 165

CIVIL RIGHTS

Act of 1964
The Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power *295*

Age Discrimination
Age Discrimination in Employment Act Amendments of 1978: Tension Between Congress and the Courts *569*

Expressional Rights
State May Require A Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibit Photographs Of Any Type 471

The Supreme Court Places Further Limitations on Designations as "Public Figure" in Libel Actions 450

Teacher Dismissal: A View from *Mount Healthy* **255**

COMPARATIVE LAW

Church-State Relations
The Spanish Experience in Church-State Relations: A Comparative Study of the Interrelationship Between Church-State Identification and Religious Liberty *616*

COMPUTERS

In General
Emerging Computer-Assisted Legal Analysis Systems *116*
Software Taxation: A Critical Reevaluation of the Notion of Intangibility *859*

CONSTITUTIONAL LAW

Civil Rights Act of 1964
The Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power *295*

Due Process
Implied Cause of Action Extending *Bivens* to the Fifth Amendment 165

Substantive Due Process Analysis of Nonlegislative State Action: A Case Study *347*

Equal Protection of the Laws
Equal Protection for Illegitimate Children: A Consistent Rule Emerges *142*

Implied Cause of Action Extending *Bivens* to the Fifth Amendment 165

The Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power *295*

Equal Rights Amendment
Maryland's Equal Rights Amendment Challenges the Common Law Action of Criminal Conversation 664

Extradition
Interstate Extradition: Should the Asylum State Governor have Unbridled Discretion? *376*

First Amendment
State May Require a Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibit Photographs of Any Type 471

The Supreme Court Places Further Limitations on Designation as a "Public Figure" in Libel Actions 450

Teacher Dismissal: A View from *Mount Healthy* 255

Privacy, Right of
An Analytical Model to Assure Consideration of Parental and Familial Interests When Defining the Constitutional Rights of Minors *598*

CONSUMER PROTECTION

Truth-In-Testing
Truth-In-Testing Legislation: A Brief for the Status Quo *902*

CONTRACTS

In General
Implied Warranty of Habitability and Security in Residential Leases 684

Recovery of Consequential Damages for Product Recall Expenditures 485

CONTRIBUTION

Antitrust
Contribution Among Antitrust Violators: A Question of Legal Process 183

Federal Law
Union Held Liable in Contribution to Employer for Title VII Violations 696

CRIMINAL LAW AND PROCEDURE

In General
The Fuller Court and State Criminal Process: Threshold of Modern Limitations on Government 275

Procedure
Application of the "Exculpatory No" Defense to Prosecutions Under 18 U.S.C. § 1001 655

The Impact of Expanded Rules for Determining What Constitutes the "Same Offense" for Double Jeopardy Purposes 948

The Jury as a Source of Reasonable Search and Seizure Law 739

Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails 1

COURTS

Appellate Supervision
Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils 233

D

DAMAGES

Consequential Damages
Recovery of Consequential Damages for Product Recall Expenditures 485

DEFAMATION

Libel
The Supreme Court Places Further Limitations on Designation as a "Public Figure" in Libel Actions 450

DUE PROCESS OF LAW

Implied Cause of Action
Extending *Bivens* to the Fifth Amendment 165

Substantive Due Process
Mr. Justice Rufus W. Peckham and the Case of *Ex Parte* Young: Lochnerizing *Munn v. Illinois* 539

Substantive Due Process Analysis of Nonlegislative State Action: A Case Study *347*

E

ECONOMICS

Wage and Price Controls
Executive Use of the Federal Procure-

ıment Act to Disbar Private Firms from Government Contracts if Wage and Price Standards are not Followed 431

EDUCATION

Teacher Dismissal
Teacher Dismissal: A View from *Mount Healthy* **255**

ELECTIONS

Federal Election Campaign Act
Reverse Political Checkoff Per Se Illegal as Violation of Federal Election Campaign Act, 2 U.S.C. § 441b 403

EMPLOYMENT DISCRIMINATION

Age Discrimination
Age Discrimination in Employment Act Amendments of 1978: Tension Between Congress and the Courts *569*

EQUAL PROTECTION OF THE LAWS

Civil Rights Act of 1964
The Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power *295*

Illegitimate Children
Equal Protection for Illegitimate Children: A Consistent Rule Emerges *142*

Sex-based Discrimination
Implied Cause of Action—Extending *Bivens* to the Fifth Amendment 165

Maryland's Equal Right Amendment Challenges the Common Law Action of Criminal Conversation 664

EXECUTIVE

Wage and Price Controls
Executive Use of the Federal Procurement Act to Disbar Private Firms from Government Contracts if Wage and Price Standards are not Followed 431

F

FAMILY LAW

Children's Rights
An Analytical Model to Assure Consideration of Parental and Familial Interests When Defining the Constitutional Rights of Minors *598*

Equal Protection for Illegitimate Children: A Consistent Rule Emerges *142*

FEDERAL COURTS

Appellate Supervision
Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils **233**

Jurisdiction
Expanding Federal Court Jurisdiction of Railway-Labor Minor Disputes 913

FEDERALISM

Extradition
Interstate Extradition: Should the Asylum State Governor have Unbridled Discretion *376*

In General
The Fuller Court and State Criminal Process: Threshold of Modern Limitations on Government **275**

Mr. Justice Rufus W. Peckham and the Case of *Ex Parte* Young: Lochnerizing *Munn v. Illinois* **539**

Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World **47**

FIRST AMENDMENT

Freedom of Press
The Supreme Court Places Further Limitations on Designation as a "Public Figure" in Libel Actions 450

Freedom of Religion
State May Require a Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibit Photographs of Any Type 471

Freedom of Speech
Teacher Dismissal: A View from *Mount Healthy* **255**

FREEDOM OF PRESS

Defamation
The Supreme Court Places Further Limitations on Designation as a "Public Figure" in Libel Actions 450

FREEDOM OF RELIGION

Free Exercise
State May Require a Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibit Photographs of Any Type 471

FREEDOM OF SPEECH

Teacher Dismissal
Teacher Dismissal: A View from *Mount Healthy* 255

G

GOVERNMENT

Political Process
In Search of a Role for the Legal System 797

GOVERNMENT AGENCIES

Administrative Law
Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act? 93

GOVERNMENT CONTRACTS

Wage and Price Controls
Executive Use of the Federal Procurement Act to Disbar Private Firms from Government Contracts if Wage and Price Standards are not Followed 431

H

HISTORY OF LAW

The Fuller Court
The Fuller Court and State Criminal Process: Threshold of Modern Limitations on Government 275

Mr. Justice Rufus W. Peckham and the Case of *Ex Parte* Young: Lochnerizing *Munn v. Illinois* 539

Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World 47

J

JUDGES

Bibliography
The Writings of Chief Justice Roger J. Traynor 561

Particular Persons
Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World 47

JUDICIAL ADMINISTRATION

Antitrust
Contribution Among Antitrust Violators: A Question of Legal Process 183

Appellate Supervision
Can the Federal Courts Keep Order in Their Own House? Appellate Supervision Through Mandamus and Orders of Judicial Councils 233

JUDICIAL REVIEW

Regulatory Orders
Extending the Limits of Judicial Review of Regulatory Orders 921

JURISDICTION

Federal Courts
Expanding Federal Court Jurisdiction of Railway-Labor Minor Disputes 913

JURISPRUDENCE

In General
Dworkin's Rights Thesis: Implications for the Relationship Between the Legal Order and the Moral Order 837

In Search of a Role for the Legal System 797

Law, the Problems of Poverty, and the "Myth of Rights" 785

Law, Society, and Moral Order: Introduction to the Symposium 721

JURY

Search and Seizure
The Jury as a Source of Reasonable Search and Seizure Law 739

JUVENILE JUSTICE

Detention
Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails 1

L

LABOR LAW

Campaign Contributions
Reverse Political Checkoff Per Se Illegal as Violation of Federal Election Campaign Act, 2 U.S.C. § 441b 403

Federal Court Jurisdiction
Expanding Federal Court Jurisdiction of Railway-Labor Minor Disputes 913

National Labor Relations Act
Employer Lawsuits Against Employees—The Right to Invoke the Legal Process Despite Anti-Union Motivation or Coercive Effect on Section 7 Rights *880*

LAW AND MORALS

In General
Dworkin's Rights Thesis: Implications for the Relationship Between the Legal Order and the Moral Order 837

The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions 811

In Search of a Role for the Legal System 797

The Jury as a Source of Reasonable Search and Seizure Law 739

Law, Society, and Moral Order: Introduction to the Symposium 721

Law, the Problems of Poverty, and the "Myth of Rights" 785

LAW AND SOCIETY

In General
Dworkin's Rights Thesis: Implications for the Relationship Between the Legal Order and the Moral Order 837

The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions 811

In Search of a Role for the Legal System 797

The Jury as a Source of Reasonable Search and Seizure Law 739

Law, Society, and Moral Order: Introduction to the Symposium 721

Law, the Problems of Poverty and the "Myth of Rights" 785

The Role of Lawyers: Beyond Advocacy 767

LEGAL ANALYSIS

Computers
Emerging Computer-Assisted Legal Analysis Systems *116*

LEGAL BIOGRAPHY

Rufus W. Peckham
Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World 47

LEGAL PROFESSION

Professional Responsibility
The Role of Lawyers: Beyond Advocacy 767

LEGISLATION

Truth-In-Testing
Truth-In-Testing Legislation: A Brief for the Status Quo *902*

M

MEDICAL MALPRACTICE

Informed Consent
California Supreme Court Expands the Informed Consent Doctrine; Physicians Have a Duty to Obtain an Informed Refusal 933

P

PATENTS

In General
Live, Human-made Bacteria as Patentable Subject Matter Under 35 U.S.C. § 101 705

POLICE POWER

Historical
Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World 47

PRACTICE OF LAW

Computers
Computer-Assisted Legal Analysis *116*

PRIVACY, RIGHT OF

Children's Rights
An Analytical Model to Assure Consideration of Parental and Familial Interest when Defining the Constitutional Rights of Minors *598*

PROPERTY

Landlord Tenant
Implied Warranty of Habitability and Security in Residential Leases 684

PUBLIC UTILITIES

Judicial Review
Extending the Limits of Judicial Review of Regulatory Orders 921

R

REMEDIES

Contribution
Contribution Among Antitrust Violators: A Question of Legal Process **183**

Union Held Liable in Contribution to Employer for Title VII Violations 696

S

SEARCHES AND SEIZURE

Juries
The Jury as a Source of Reasonable Search and Seizure Law **739**

SOVEREIGN IMMUNITY

Particular Applications
Liability in Mass Immunization Programs **69**

STATUTES

Construction of
Age Discrimination in Employment Act Amendments of 1978: Tension Between Congress and the Courts *569*

Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act? *93*

Application of the "Exculpatory No" Defense to Prosecutions Under 18 U.S.C. § 1001 655

The Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power *295*

T

TAXATION

In General
Software Taxation: A Critical Reevaluation of the Notion of Intangibility *859*

TORTS

Criminal Conversation
Maryland's Equal Rights Amendment Challenges the Common Law Action of Criminal Conversation 664

Defamation
The Supreme Court Places Further Limitation on Designation as a "Public Figure" in Libel Actions 450

Medical Malpractice
California Supreme Court Expands the Informed Consent Doctrine; Physicians Have a Duty to Obtain an Informed Refusal 933

Particular Torts
Implied Warranty of Habitability and Security in Residential Leases 684

Liability in Mass Immunization Programs **69**

Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails **1**

U

UNIFORM COMMERCIAL CODE

Damages
Recovery of Consequential Damages for Product Recall Expenditures **485**